STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 29, 2013
v	No. 305972 Wayne Circuit Court
RICKY DARNELL SCOTT, Defendant-Appellant.	LC No. 10-012843-FC

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of kidnapping, MCL 750.349, and four counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(c). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life in prison for the kidnapping conviction and 60 to 90 years in prison for each CSC conviction. Defendant appeals as of right, and we affirm.

Defendant was convicted of confining the victim in a motel room and then sexually assaulting her. The victim testified that she was acquainted with defendant, whom she knew as a friend of her boyfriend's grandmother. According to the victim, defendant agreed to drive her home but instead stopped at a motel and told her that another friend of his would drive her home. While waiting for defendant's other friend to arrive, defendant began making sexual advances toward the victim and threatened to call his friends to assault or kill the victim if she did not pose for nude photographs. After the victim complied with defendant's demands, defendant sexually assaulted her. According to the victim, defendant thereafter fell asleep and she was able to leave. The victim testified that she obtained money for cab fare from a clerk at the motel. Defendant did not testify on his own behalf.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he is entitled to a new trial because his trial counsel was ineffective. Because defendant did not raise an ineffective assistance of counsel claim in the trial court and this Court denied defendant's motion to remand on this issue, our review of this issue is limited to errors apparent from the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's

error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (internal quotations and citation omitted). Defense counsel is also given "wide discretion in matters of trial strategy," and this Court "will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant argues that his trial counsel was ineffective for failing to investigate and call the cab driver and occupants of the adjacent motel room as witnesses at trial and for failing to present other favorable evidence. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, there is no record evidence that any of these witnesses would have given testimony favorable to defendant. Defendant has not obtained affidavits from any witnesses summarizing their proposed testimony. Similarly, defendant has not provided any evidence to support his assertion that telephone records actually contain information supportive of a defense. Therefore, defendant has not shown that the failure to call these witnesses or to present this evidence deprived him of a substantial defense.

Defendant has also failed to demonstrate that trial counsel was ineffective for not presenting the victim's written statement requesting withdrawal of her accusations. Defense counsel elicited on cross-examination of Detective Taft that the victim did not want to proceed with the prosecution of the case. Counsel elicited that the victim wrote a statement indicating "that it would be a great thing if she dropped this case." Because the substance of this evidence was presented to the jury, defendant has not demonstrated that he was deprived of a substantial defense. Although defendant contends that trial counsel should have confronted the victim with her statement during his cross-examination of her, that decision was a matter of trial strategy. Counsel reasonably may have wanted to avoid giving the victim an opportunity to explain her reasons for the request. Defendant has failed to overcome the presumption of sound trial strategy.

Defendant also argues that defense counsel was ineffective for failing to obtain or review a videotape from the motel to determine whether the victim checked defendant's Jeep for her belongings, or whether the Jeep had been left unlocked. However, defendant has not demonstrated that any videotape actually exists and, if it does, he has not provided a copy or any other documentary evidence summarizing the contents of the videotape. Accordingly, defendant has not established the necessary factual support for this claim.

Defendant also argues that defense counsel was ineffective for not calling him to testify in his own defense. A criminal defendant has a constitutional right to testify. *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985). While the decision whether to call a defendant to testify is generally a matter of trial strategy, *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984), the defendant retains the ultimate authority to decide whether to testify, *Jones v Barnes*, 463 US 745, 751, 103 S Ct 3308, 77 L Ed 2d 987 (1983). Thus, the defendant has the right to testify even if counsel disagrees with that decision. *Simmons*, 140 Mich App at 685.

At trial, defendant informed the trial court that he had decided of his own accord to not testify at trial. At sentencing, defendant explained that he decided not to testify because he "didn't want to act like I was some kind of wild man." Although defendant now asserts that a reasonably competent attorney would have prepared him to testify, his statements on the record at trial and sentencing indicate that he decided not to testify of his own accord. Further, the record does not disclose what advice, if any, defense counsel gave to defendant regarding the decision to testify, and defendant has not submitted an affidavit or other offer of proof on this issue. Accordingly, there is no basis for concluding that defense counsel gave constitutionally deficient advice or that counsel's conduct fell below an objective standard of reasonableness.

In sum, the record does not support defendant's argument that he was denied the effective assistance of counsel.

II. KIDNAPPING SENTENCE

Defendant next argues that his life sentence for kidnapping is invalid because it constitutes a departure from the sentencing guidelines range and the trial court did not state substantial and compelling reasons for the departure. We disagree. Questions involving the application and interpretation of statutes are reviewed de novo as questions of law. *People v Franklin*, 298 Mich App 539, 542; 828 NW2d 61 (2012).

MCL 769.34(2) states that a trial court must impose a sentence within the range established by the sentencing guidelines, unless the court departs from that range as provided in subsection (3) of the statute. If a minimum sentence is within the appropriate guidelines range, this Court must affirm the sentence absent an error in the scoring of the guidelines or reliance on inaccurate information at sentencing. MCL 769.34(10). Defendant asserts on appeal that his life sentence exceeds his minimum sentencing guidelines range of 171 to 570 months.

Kidnapping is a Class A felony, MCL 777.16q, that is punishable by "imprisonment for life or any term of years," MCL 750.349(3). On appeal, defendant does not challenge the trial court's scoring of the prior record variable score of 135 points and the offense variable score if 115 points. Thus, the undisputed scoring combination placed defendant in the F-VI cell of the applicable sentencing grid. Even without factoring in defendant's habitual offender status, his minimum guidelines range would have been "270-450 [months] *or life*." MCL 777.62 (emphasis added). Defendant's status as a habitual offender simply raised the minimum guidelines range to be 270 to 900 months *or life*. See MCL 777.21(3)(c). Accordingly, defendant's life sentence for kidnapping is within the guidelines range. Because defendant does not challenge the scoring of

the guidelines and has not demonstrated that the trial court relied on inaccurate information at sentencing, this Court must affirm that sentence.[1] MCL 769.34(10).

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which has merit.

A. PROSECUTORIAL MISCONDUCT

Defendant raises several claims of prosecutorial misconduct, which he agrees were not preserved with appropriate objections in the trial court. Accordingly, we review these claims for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282; 288; 632 NW2d 162 (2001).

Prosecutors are generally "accorded great latitude regarding their arguments and conduct" and "are free to argue the evidence" as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal citations and quotations omitted). "Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). "When a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

Defendant argues that the prosecutor improperly attempted to bolster the victim's credibility and appeal to the jury's sympathy for the victim by referring to the victim in opening statement as a "nice church girl." The record does not indicate that the prosecutor made this statement. Rather, the prosecutor began her opening statement by stating, "September 9, 2010 a young innocent girl who's naïve and very sweet had her innocence stolen from her[.]" Because the victim testified that she agreed to accompany defendant to his motel room only because defendant led her to believe that his friend would be coming there to give her a ride, and the victim denied willingly engaging in sex with defendant, it was not improper for the prosecutor to characterize the victim as innocent and naïve. The prosecutor's use of the additional adjective "sweet" to further characterize the victim was not outside the bounds of proper argument. Moreover, the prosecutor's statement was not an overt attempt to appeal to the jury's sympathy. In any event, the trial court properly instructed the jury to avoid deciding the case based on sympathy, thereby protecting defendant's substantial rights. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

In closing argument, the prosecutor stated:

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[1] Although defendant asserts in his Standard 4 brief that the trial court relied on inaccurate information at sentencing, the record does not support defendant's claim. See Part III.E., *infra*.

> We know that she's nineteen. She's a high school graduate. She's going to college to become a medical assistant. She goes to church and she lives with her family. Is there anything about her background that screams to you, she's a big fat liar-liar? Well, no there's not.

The prosecutor was entitled to argue from the facts that the victim was worthy of belief. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). The reference to the victim's church attendance as being probative of her truthfulness arguably violated the prohibition against use of a witness's religious beliefs to enhance credibility, see MRE 610, but this isolated reference is too innocuous to have affected defendant's substantial rights. See *People v Dobek*, 274 Mich App 58, 72-76; 732 NW2d 546 (2007).

Defendant also asserts that the prosecutor made other statements of fact that were not supported by the evidence. Defendant complains that the prosecutor explained the victim's decision to ask defendant to drive her home by stating that the victim's mother was not at home to give her a ride. Defendant also complains that the prosecutor stated that the victim had two checks in her purse, that she had a good relationship with her father, and that defendant outweighed the victim by at least 150 pounds. The record does not support these claims of misconduct. Defendant does not provide record citations for these alleged misstatements. We have reviewed the record and the alleged misstatements do not appear in the prosecutor's opening statement or closing arguments. Therefore, we find no merit to these claims.

Defendant also asserts that the police or prosecution improperly coerced the victim's testimony by threatening to prosecute the victim for taking property from defendant's vehicle if she did not cooperate with defendant's prosecution and that the prosecutor knowingly presented the victim's false testimony about whether defendant's vehicle was unlocked.

Police or prosecutor intimidation to coerce a witness to testify or change her testimony violates a defendant's right to due process. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Further, it is axiomatic that a prosecutor may not knowingly use false testimony and has a constitutional obligation to correct false evidence if she knows or "can be deemed to have known" that her witness lied. *People v Lester*, 232 Mich App 262, 278-280; 591 NW2d 267 (1998). However, the mere fact that a witness's testimony conflicts with other evidence does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

Defendant's supposition that the police coerced the victim into cooperating with defendant's prosecution by threatening to charge her with theft has no evidentiary basis. Defendant asserts that the victim gave him this explanation via a text message, but he has not produced any supporting evidence. Further, although the testimony indicated that the police seized defendant's phone, defendant does not explain what efforts he made to obtain his own cell phone records. Consequently, this claim of prosecutorial misconduct lacks any factual support.

Defendant also accuses the trial prosecutor of knowingly allowing the victim to testify falsely at trial. Defendant cites the victim's trial testimony that she was able to get into defendant's Jeep because he had left it unlocked and contends that this testimony is contrary to her preliminary examination testimony that she used defendant's keys to enter the Jeep.

Defendant also contends that the prosecutor inaccuratelty stated in closing argument that defendant wanted the jury to believe that his Jeep was unlocked. Again, the record does not support these claims. At the preliminary examination, the victim testified that she did not return to the motel room after she left. When asked if she went to defendant's truck for anything, she stated that she checked the truck to see if her overnight bag was there, but did not find it inside the vehicle. She denied taking any money from the vehicle or looking inside the vehicle's console. This record does not factually support defendant's claim that the victim testified at the preliminary examination that she used defendant's keys to get inside his vehicle. Rather, at the preliminary examination, the victim did not explain how she was able to get inside the vehicle. Accordingly, the record does not support defendant's claim that the prosecutor knowingly allowed the victim to falsely testify at trial that the vehicle was unlocked.

Defendant also asserts that the prosecutor misled the jury during closing argument by stating, "We all know that part of Melvindale, and the defendant wants you to believe that his vehicle was unlocked." Again, the record fails to reveal that the prosecutor made this statement. Rather, the record discloses that the prosecutor made the following remarks:

> Now, when she was on the stand defense counsel asked her, well, weren't you in his jeep looking around for money? Well, no. Who in the hell keeps money in their jeep at a hotel that's not exactly the nicest and doesn't lock their doors? That makes absolutely no sense.
>
> There was nothing in that car worth any value. She was there to get any belongings that she possibly could have left in his car so she didn't have to have any further contact with him when she told what was going on.

These remarks were a proper response to the defense suggestion that the victim went to defendant's vehicle to look for money. The prosecutor did not assert that defendant wanted the jury to believe that his vehicle was unlocked but, rather, commented on the fact that it was unlocked, which was supported by the victim's testimony, to argue that defendant would not have kept money inside the vehicle. Defendant has not demonstrated that the prosecutor's arguments were improper.

We also reject defendant's argument that the prosecutor violated her duty to disclose exculpatory evidence. The prosecution has a duty to disclose any exculpatory and material evidence in its possession, regardless of whether the defendant requests the evidence. *Brady v Maryland*, 373 US 83, 87-88; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Jackson*, 292 Mich App 583, 590-591; 808 NW2d 541 (2011). The prosecutor's failure to disclose exculpatory evidence violates the defendant's constitutional right to due process. *Brady*, 373 US at 87; *Jackson*, 292 Mich App at 590-591. To establish a *Brady* violation, a defendant must show:

> "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different."

[*People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009), aff'd 488 Mich 922 (2010), quoting *Lester*, 232 Mich App at 281-282.]

Defendant makes several claims that the prosecutor suppressed, or even altered, potentially exculpatory evidence. He asserts that the prosecutor failed to disclose that his cell phone contained a text message from the victim apologizing for falsely accusing defendant and blaming the police for threatening to prosecute her if she did not press charges against defendant. Again, however, defendant has not established any factual support for this claim, and he does not explain why he did not have access to his own phone messages, or why he could not have obtained the messages with reasonable diligence. Therefore, defendant cannot establish a *Brady* violation.

Defendant also accuses the prosecutor of suppressing "the results of tests that are commonly used to exclude suspects of rape." Defendant does not explain the nature of these tests but merely cites *Davis v Pitchess*, 388 F Supp 105 (CD Cal, 1974), which was ultimately reversed on other grounds by the United States Supreme Court in *Pitchess v Davis*, 421 US 482; 95 S Ct 1748; 44 L Ed 2d 317 (1975). Regardless, *Davis* involved the prosecutor's failure to disclose slides containing bodily fluid secretions collected from the victim. Unlike the defendant in *Davis*, who demonstrated the existence of undisclosed evidence, defendant here has failed to establish that any biological evidence was suppressed.

Defendant also accuses the prosecutor of altering the transcripts by removing unfavorable portions and replacing them with statements favorable to the prosecution's case. In support of this claim, defendant relies on his affidavit in which he identifies portions of the transcript that he avers are inaccurate. Certified transcripts of proceedings are presumed to be accurate, but that presumption may be rebutted. *People v Abdella*, 200 Mich App 473, 475-476; 505 NW2d 18 (1993). To overcome the presumption of accuracy, a defendant must "(1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; and (4) describe how the claim inaccuracy in transcription has adversely affected the ability to secure . . . relief." *Id*. at 476. In this case, defendant never challenged the accuracy of the transcripts in accordance with this procedure. Therefore, we reject this claim of error.

B. SUBSTITUTION OF JUDGES

Defendant argues that reversal is required because Judge Lawrence Talon was improperly substituted for the original assigned judge, Judge Annette Berry, on the day scheduled for trial. Because defendant did not object to the substitution, this issue is unpreserved and defendant has the burden of establishing a plain error affecting his substantial rights. *People v Allan*, 299 Mich App 205, 322-323; 829 NW2d 319 (2013).

MCR 8.111(C) provides that if a "judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may assign it to another judge by a written order stating the reason." On the date scheduled for trial, the parties appeared before Judge Talon, who announced, without objection, that the case had been assigned to him because Judge Berry had an "emergency." The record contains a transfer order signed by the chief judge reassigning the case from Judge Berry to Judge Talon. Because MCR 8.111(C) permitted the chief judge to

reassign this case for good cause if the original judge could not undertake the case, and the record indicates that Judge Berry was not able to preside over defendant's trial due to an emergency, defendant has not shown that Judge Talon's substitution for Judge Berry was plain error.

C. JURY INSTRUCTIONS

Defendant argues that the trial court erred by failing to give requested jury instructions regarding the impeachment of witnesses. At trial, defense counsel expressed satisfaction with the jury instructions as given, thereby waiving this claim of instructional error. Accordingly, there is no error to review. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Even if the issue was not waived, however, the record does not support defendant's claim that the requested jury instructions were not given. At trial, defense counsel requested that the trial court give both "the prior inconsistent statement as well as the statement given under oath where they can use it as substantive proof as to whether a person is actually lying or not." The trial court instructed the jury as follows:

> If you believe that a witness previously made a statement inconsistent with his or her testimony at trial the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court.
>
> The earlier statement is not evidence that what the witness said earlier is true. However, if that earlier inconsistent statement was made under oath at a preliminary examination you may consider such earlier statement in deciding the facts of the case.

Because the record indicates that the requested jury instructions were given, there is no merit to this claim of instructional error.

D. OPPORTUNITY TO REVIEW THE PRESENTENCE REPORT

The record does not support defendant's argument that he was not afforded an opportunity to review the presentence report. MCR 6.425(E)(1)(a) requires the trial court at sentencing to "determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report." At sentencing, the trial court asked defendant whether he "had an opportunity to go over the Presentence Investigation Report with [defense counsel]?" Defendant responded, "Yes." Thus, there is no merit to this issue.

E. CONSIDERATION OF INACCURATE INFORMATION AT SENTENCING

The record also fails to support defendant's claims that he was sentenced on the basis of inaccurrate information.

A defendant is entitled to be sentenced on the basis of accurate information. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). Defendant identifies four allegedly inaccurate items of information that he contends were improperly considered at sentencing. He

first argues that the presentence report did not accurately set forth his criminal history because it included the criminal record of his brother. However, we have reviewed the presentence report, and it contains no reference to defendant's brother. Further, defendant advised the court at sentencing that he had reviewed the presentence report, and he stated that it was factually accurate. Even on appeal, defendant does not specify what information in the presentence report allegedly pertained to his brother and not to him. Accordingly, we find no merit to this claim.

Defendant next argues that the trial court inaccurately believed that he had served six prior prison sentences and had also served seven months in the Wayne County Jail. Regarding the prison sentences, defendant does not specify where this allegedly inaccurate information appears. Neither the presentence report nor the parties' or the trial court's statements on the record at sentencing refer to six prior prison sentences. Although the prosecutor stated that defendant had six prior felony convictions, which is supported by the uncontested information in defendant's presentence report, the prosecutor did not state that defendant had been sentenced to six prior prison terms. Moreover, when imposing sentence, the trial court recounted defendant's criminal history, as set forth in his presentence report, and accurately noted that defendant had been sentenced to prison for his possession with intent to deliver cocaine and felony nonsupport convictions but had been sentenced to probation for his other convictions. Given this record, there is no merit to defendant's argument that the trial court inaccurately believed that he had received six prior prison sentences. Regarding the seven-month jail term, the trial court noted at sentencing that defendant had been sentenced to seven months in jail for violating his probation in connection with an attempted possession of cocaine conviction. That statement is supported by information in defendant's presentence report, which defendant agreed was factually accurate. Thus, the record does not support defendant's claim that the trial court relied on inaccurate information regarding his prior prison or jail sentences.

Defendant next argues that the trial court improperly relied on the prosecutor's inaccurate representation that he had sexually assaulted a 15-year-old girl in 1995. The prosecutor referred to a prior sexual assault case at sentencing, which she stated was "startling similar" to the present case but acknowledged that defendant was found not guilty in that case. When imposing sentence, the trial court stated:

> I'm not going to consider in my sentencing decision that you were previously charged with other criminal sexual conduct cases because there were no convictions on any of those for criminal sexual conduct.

Because the trial court expressly declined to consider this information, there is no merit to defendant's argument that it affected his sentences.

Defendant lastly argues that the trial court wrongly considered a 1997 plea-based conviction of which he was later exonerated. At sentencing, the trial court stated that defendant had pleaded guilty to assault and battery and was sentenced to probation in the 1997 case. That statement is consistent with item no. 7 in defendant's presentence report, which defendant agreed was factually accurate. Although defendant asserts on appeal that he was later "exonerated" in that case, he relies only on his own affidavit in which he merely asserts that the court dismissed his remaining probation in that case. Because defendant has not provided any factual support for

his claim that the conviction itself was ever set aside, he has failed to show that the trial court relied on inaccurate information.

Accordingly, defendant has not demonstrated that he was sentenced on the basis of inaccurate information, and his claims fail.

F. FAILURE TO EXCUSE A JUROR

Defendant next argues that his right to an impartial jury was violated when the trial court failed to remove a juror who denied during voir dire that any members of her family were associated with law enforcement. We conclude that this issue is waived because, after being informed midtrial that the juror's husband was employed by the FBI, defense counsel expressly indicated that he did not want to excuse the juror from the jury. Because counsel waived this claim, there is no error to review. *Kowalski*, 489 Mich at 504.

Even if the issue was not waived, however, defendant has not demonstrated entitlement to relief. The juror in question stated during voir dire that her husband was employed as a "forensic accountant," but she responded "no" when asked whether she or any family member were associated with police officers or law enforcement officials. The juror later revealed during midtrial that, after a conversation with her sister, she realized that she should have reported that her husband was employed by the FBI. The juror explained that it did not occur to her previously that her husband's employment with the FBI was relevant because he was not a sworn agent and instead was employed as a civilian employee.

Even if the juror should have disclosed her husband's employment with the FBI during voir dire, her failure to do so does not automatically entitle defendant to relief. "A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury." *People v Miller*, 482 Mich 540, 548; 759 NW2d 850 (2008). "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* at 550. Here, the circumstances indicate that the juror did not intend to mislead the court or the parties, and there is no indication that the juror was not impartial. Further, the juror's husband's employment as an accountant for the FBI does not demonstrate a disqualifying bias. Accordingly, even if this issue had not been waived, because there is no basis for concluding that the juror's continued presence on the jury affected defendant's right to an impartial jury, appellate relief is not warranted.

G. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant raises several additional claims of ineffective assistance of counsel, none of which has merit.

Defendant argues that counsel was ineffective for failing to pursue various means of impeaching the victim's trial testimony. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76. Cross-examination of witnesses is also a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). To establish ineffective assistance of counsel, a defendant must overcome the strong presumption of sound strategy. *Id.* Although defendant asserts that he could have provided defense counsel with important impeachment

information if counsel had consulted with him, he does not specify what additional information he would have provided. During his cross-examination of the victim, defense counsel elicited factual information that he was able to use to argue that her conduct before the alleged incident, while at the motel, and after she left the motel was inconsistent with her claim that she was sexually assaulted. Although defendant suggests other methods by which counsel could have attempted to impeach the victim's testimony, he has not overcome the strong presumption that trial counsel employed sound strategy.

Further, we find no merit to defendant's argument that defense counsel's cross-examination of the DNA expert was deficient. Contrary to what defendant argues, counsel elicited the expert's admissions that her findings did not necessarily mean that the victim's injuries were caused by a sexual assault or that any sexual activity was not consensual. Defense counsel's cross-examination of the DNA expert did not fall below an objective standard of reasonableness.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's alleged misconduct. We previously concluded in Part III.A., *supra*, that the prosecutor's conduct either was not improper or did not prejudice defendant's right to a fair trial. Therefore, even assuming that some objections could have been made, defendant was not prejudiced by counsel's failure to object.

Next, defendant argues that defense counsel was ineffective for failing to investigate potentially fruitful leads, including a statement that one witness allegedly made to the police to the effect that the victim and her boyfriend had fabricated the allegations against defendant to extort money, the victim's mother's observations of the victim immediately before the alleged incident, a motel surveillance video, telephone records and recorded conversations between the victim and the police, DNA testing of the victim's clothing, and the victim's statements to the three police departments. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Here, however, the record does not indicate what efforts, if any, defense counsel made to investigate these matters. More significantly, defendant has not provided any factual support for his claim that a failure to investigate these matters deprived him of valuable evidence. Defendant has not submitted any witness affidavits summarizing any proposed testimony or provided any basis for believing that the physical evidence that he identifies actually exists or would yield information favorable to his case. Defendant's unsupported allegations are insufficient to demonstrate that he was denied the effective assistance of counsel.

Defendant also argues that counsel was ineffective for failing to request the removal of the juror who did not reveal until midtrial that her husband was employed by the FBI. The decision whether to request the juror's removal was a matter of trial strategy. As discussed in Part III.F., *supra*, there is no indication that the juror was not impartial. Thus, defendant has not overcome the presumption that counsel's decision to allow the juror to remain on the jury was reasonable trial strategy, nor has he demonstrated that he was prejudiced by the juror's continued presence on the jury.

Defendant also argues that defense counsel was ineffective for failing to object to inaccurate information at sentencing. Because defendant informed the trial court at sentencing

that he and defense counsel had reviewed the presentence report, and defendant agreed that the report was factually accurate, there is no basis for finding that counsel had a reason to object to the accuracy of the presentence report. Further, as discussed in Part III.E., *supra*, there is no merit to defendant's other claims that the trial court relied on inaccurate information at sentencing. Accordingly, defendant's related ineffective assistance of counsel claim also cannot succeed.

Further, defense counsel was not ineffective for failing to object to the substitution of Judge Talon for Judge Berry on the day scheduled for trial. As discussed in Part III.B., *supra*, the record discloses that Judge Talon was substituted for Judge Berry in accordance with MCR 8.111(C) because Judge Berry was unable to hear the case due to an emergency. Because there is no basis for concluding that the substitution was improper, defendant cannot show that defense counsel was ineffective for failing to object. Counsel is not ineffective for failing to make a futile objection. *Ericksen*, 288 Mich App at 201.

In sum, defendant has not established that he was denied the effective assistance of counsel.

H. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant also argues that appellate counsel was ineffective. In reviewing this issue, we apply the same standards for evaluating the effectiveness of trial counsel. *Uphaus*, 278 Mich App at 185.

Defendant argues that appellate counsel was ineffective for failing to provide him with copies of the trial transcripts in order to enable him to properly prepare his Standard 4 brief. However, it appears that defendant received the transcripts four days before he filed his Standard 4 brief. Even assuming that defendant had a right to the transcripts, he has not shown how their earlier unavailability precluded him from raising a potentially meritorious claim on appeal. Thus, there is no basis for concluding that defendant was prejudiced by the delay.

Defendant also argues that appellate counsel was ineffective for not raising all requested issues. An appellate attorney is not ineffective for refusing to raise weaker arguments in order to focus on issues more likely to prevail. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Further, through his Standard 4 brief, defendant has been afforded the opportunity to raise additional issues that he believes appellate counsel should have raised but did not. This opportunity cured any prejudice that might have arisen from counsel's failure to raise a requested issue.

Defendant also argues that appellate counsel failed to "federalize" his sentencing issue by asserting claims that his sentence violated the United States Constitution. Because defendant fails to specify a sentencing error that arises under the federal constitution, he has failed to demonstrate that appellate counsel was ineffective in this respect.

Defendant lastly argues that appellate counsel was complicit with the prosecutor in falsifying transcripts. However, defendant's failure to provide factual support for this claim precludes relief.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kurtis W. Wilder